

1 On February 16, 2011 this Court entered an Order in the above-captioned matter directing
2 the parties to solicit nominations for *cy pres* organizations and ordering Class Counsel to
3 consolidate the list and to submit the organization and distribution amount nominations to this
4 Court, with specific information about each, by March 28, 2011. *See* Order Re Nomination
5 Process for *Cy Pres* Recipients (“Order”), Dkt. 117, February 16, 2011. The parties carried out
6 each of the directives contained in the Order. With the assistance of the Rose Foundation, the
7 parties solicited and collectively received 77 applications for *cy pres* funding seeking a total of
8 more than \$35 million. Pursuant to the Settlement Agreement, counsel for the parties negotiated
9 a list of final nominations and amounts. Class Counsel then consolidated the list and submitted
10 the organization and distribution amount nominations to the Court for approval on March 25,
11 2011, attaching all of the requisite information ordered by the Court. *See* Class Counsel’s
12 Submission of *Cy Pres* Organizations and Distribution Amounts for Court Approval (“Counsel’s
13 Submission”), Dkt. 119, March 25, 2011, and Exhibits A & B.
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15 The parties received requests for much more funding than there is money available under
16 the settlement. Many deserving organizations applied, and the parties necessarily made some
17 difficult decisions to determine the slate of *cy pres* nominations Class Counsel would submit to
18 the Court. In submitting the proposed nomination list to the Court, the parties complied with (1)
19 all aspects of this Court’s Order of February 16; (2) the terms of the Settlement Agreement, as
20 each nominee is an existing organization focusing on Internet privacy policy or privacy education
21 agreed to by the parties, *see* Settlement Agreement, ¶ 3.4; and (3) the requirements of law, as the
22 nominees are all organizations that conduct Internet privacy research and education, and each
23 therefore pursues goals closely aligned with the interests of the class. *See Six Mexican Workers*
24 *v. Ariz. Citrus Growers*, 904 F.2d 1303, 1308 (9th Cir. 1990). As set forth in Class Counsel’s
25 March 25, 2011 filing, Class Counsel have submitted to this Court a list of nominees that is fair,
26 reasonable, and adequate, and funding Class Counsel’s nominations would promote the interests
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1 of the class.

2 Among the 65 groups that the parties did not recommend for funding, 8 have filed a
 3 pleading objecting to Class Counsel's nominations. *See Cy Pres* Applicants' Objection to Class
 4 Counsel's Proposed *Cy Pres* Distribution ("Applicants' Objection"), Dkt. 121, March 30, 2011.
 5 Additionally, three class members who previously objected to the Settlement have filed an
 6 additional objection to the *cy pres* nominations. Objections to Proposed Order and Final
 7 Judgment Granting Final Approval of Class Action Settlement and Awarding Attorneys' Fees
 8 ("Class Member Objection"), Dkt. 122, March 30, 2011. Both objections contend that Class
 9 Counsel should have nominated a different set of organizations for *cy pres* funding; the 8
 10 disappointed applicants propose that 100% of the available funds should be distributed to their 8
 11 groups alone and none should go to any of the 12 groups nominated by Class Counsel or to any
 12 other group. *See* Applicants' Objection, Appendix 1. The objectors argue (1) that the nominated
 13 groups suffer two harms: that they are too closely aligned with Google because some of them
 14 received funding from Google in 2010¹ and that they are ineffectual in addressing internet
 15 privacy;² (2) that awards to the nominated groups would violate some legal norm; and (3) that
 16 their alternative slate (in the case of the Applicant Objectors) is a better set of nominees. Each of
 17 these arguments is meritless and thus objectors do not come close to meeting their burden of
 18 proving any assertions they make in arguing against the reasonableness of settlement.³
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 23 ¹ *See, e.g.*, Applicants' Objection, at 9 ("Six of the twelve groups designated by Class
 24 Counsel were funded by Google last year"); Class Member Objection, at 3 ("many of these
 25 groups, or the institutions with which they are affiliated, receive funding from Defendant or have
 26 other entanglements that were not reported to the Court.").

27 ² Applicants' Objection at 9 ("Virtually none of the organizations receiving funds in the
 28 proposed *cy pres* settlement showed any interest in the circumstances of Class members prior to
 the announcement of the *cy pres* settlement in this matter,"); *id.* at 9-10 (stating that the
 29 nominated groups "stand by quietly while others do the actual work of safeguarding Internet
 30 privacy").

³ *See U.S. v. State of Or.*, 913 F.2d 576, 581 (9th Cir. 1990) ("[W]e have usually imposed

I.

2 **THE NOMINATED GROUPS ARE WELL-SITUATED TO PURSUE THE CLASS'S
INTERESTS**

3 Objectors' contentions that the nominated groups are too close to Google or ineffectual
 4 are both unsupported and unsupportable. The *cy pres* organizations nominated by Class Counsel
 5 are not unusually connected to Google. Six of the 12 nominated organizations received no
 6 funding from Google in 2010; of the other 6 that did receive funding, four received a negligible
 7 amount of their annual funding from Google (Berkman Center, 5.6% of its annual budget;
 8 Brookings Institution, less than two-tenths of one percent of its annual budget; Center for
 9 Democracy & Technology, 9% of its annual budget; Electronic Frontier Foundation ("EFF"), less
 10 than one tenth of one percent of its annual budget). Only two recipients (Carnegie Mellon and
 11 Stanford) received what appears to be a significant budgetary amount from Google, but of course
 12 that is only if the Google contribution for 2010 is judged in terms of the unit receiving the grant
 13 and not in terms of the university's budget; obviously, Google funds but a minute fraction of
 14 these major universities' expenses and has little, indeed no, ability to control what these
 15 universities do or say.

16 Objectors not only incorrectly describe the extent of the nominated groups' Google funds,
 17 they also inaccurately report what those funds are used for, stating that the six groups that
 18 received 2010 funds from Google "are currently paid by Google to lobby for or to consult for the
 19 company." Applicants' Objection at 2; *id.* at 9. Objectors do not offer any support for this
 20 statement, and they cannot: there is no basis whatsoever to draw this conclusion. None of these
 21 organizations is paid to lobby or consult with Google.

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 27 the burden on the party objecting to a class action settlement"); *Geier v. Alexander*, 801 F.2d 799,
 28 809 (6th Cir. 1986) ("To allow the objectors to disrupt the settlement on the basis of nothing
 more than their unsupported suppositions would completely thwart the settlement process.").

Indeed, Class Counsel's nominees have repeatedly demonstrated their independence, not least by publishing materials and taking advocacy positions adverse to Google when they believed doing so would support the privacy interests of Internet users and consumers. Both the ACLU and EFF specifically criticized Google's launch of Buzz.⁴ And the nominated groups' criticism of Google's launch of Buzz are not isolated examples. The ACLU, EFF, and Samuelson Law Clinic at Berkeley – which together account for nearly 50% of Class Counsel's proposed distribution – have done the following:

- EFF, ACLU, and the Samuelson Law, Technology & Public Policy Clinic jointly filed and argued an objection to a class settlement concerning Google's book scanning project, arguing in part that the settlement did not do enough to protect user privacy because Google may collect information on users' reading habits. See Privacy Authors and Publishers' Objection to Proposed Settlement, Authors Guild, Inc. v. Google Inc., No. 5-cv-8136-DC (S. D. N.Y. Sep. 8, 2009). The federal district court recently rejected this settlement and cited the privacy concerns raised by EFF, ACLU, and Samuelson in its order denying settlement approval. Opinion, 05-cv-8136 (DC), at 39-40 (S. D. N.Y. Mar. 22, 2011) (Dkt. 971).
- ACLU urged citizens to send letters to Google asking the company not to enter into a planned information-sharing agreement with the National Security Agency. <http://www.aclu.org/blog/national-security-technology-and-liberty/tell-google-not-enter-agreement-nsa>
- EFF published a warning and how-to guide for Gmail users seeking to disable the link between Google web searches and web advertising in their Gmail accounts. See <https://www.eff.org/deeplinks/2004/04/gmail-rough-guide-protecting-your-privacy>
- EFF published numerous blog posts critical of Google's privacy practices. See, e.g. www.eff.org/deeplinks/2010/05/time-google-grow-make-open-wi-fi-privacy-mistake (criticizing Google's accidental collection of wireless internet data while building street

⁴See Chris Conley, *Google's CEO Doesn't Get It* (Feb. 18, 2010) (ACLU post stating that Google "needs to take [the] lesson [of Buzz's launch] to heart. Instead of giving in to the temptation to leverage information that it already has about users of Google products, Google needs to recognize that it holds that information in trust for its users and respect their right to control how or whether that information is used for any other purposes" and urging readers to "keep up the pressure" by contacting Google to complain), available at: http://www.aclunc.org/issues/technology/blog/google's_ceo_doesn't_get_it.shtml; Kurt Opsahl, *Google Buzz Privacy Update* (Feb. 16, 2010) (EFF post stating that "Google leveraged information gathered in a popular service (Gmail) with a new service (Buzz), and set a default to sharing your email contacts to maximize uptake of the service. In the process, the privacy of Google users was overlooked and ultimately compromised."), available at: <https://www.eff.org/deeplinks/2010/02/google-buzz-privacy-update>.

view); <https://www.eff.org/deeplinks/2008/02/google-gets-healthy> (warning consumers that Google's beta project to collect personal health records might present privacy risks).
 The Applicant Objectors are inaccurate in characterizing the nominated groups as ones that are inordinately connected to Google.

Applicant Objectors' other swipe at the nominated slate is that it consists of groups that "stand by quietly while others do the actual work of safeguarding Internet privacy." *Id.* at 9-10. This characterization is disingenuous in light of the fact that these objectors work cooperatively with many of the nominated groups on a regular basis, conducting activities such as jointly filing amicus briefs, distributing joint press releases, participating in workshops sponsored by the nominated groups, co-authoring research, and co-signing letters to corporations and lawmakers.
 A partial list of these overlapping activities is attached as Exhibit A and that partial list alone contains more than 150 entries of overlapping activities among the groups. Applicant Objectors are fully aware that the nominated groups are not by-standers.

Worse than their failure to acknowledge to the Court the work of the nominated groups with which they are very familiar, the Applicant Objectors purposefully conceal this knowledge in their submission. For example, the Applicant Objectors write that:

The organizations excluded from the Submission of Class Counsel have frequently cooperated to protect privacy rights of Internet users. For example, in June 2008, EPIC, WPF, PRC, and others sent a letter to Google demanding that the company comply with California law and place a prominent link to its privacy policy on its homepage. EPIC, WPF, and PRC were successful in this effort, and, within weeks, a "privacy" link appeared on Google's homepage.
 Applicants' Objection at 7-8. What the Applicant Objectors fail to inform the Court is that among the "and others" in this effort were the nominated groups, EFF and the ACLU. *See Letter to Eric Schmidt, CEO of Google Inc., dated June 3, 2008, available at* http://www.worldprivacyforum.org/pdf/Google_Letter_June032008fs.pdf.

The Applicant Objectors' attacks on the work of the nominated groups as being either Google-connected or ineffectual are therefore both misleading and simply wrong.

II.

OBJECTORS PROVIDE NO LEGAL SUPPORT FOR THEIR CONCERNS

Beyond misrepresenting the nominated groups' links to Google, Objectors contend that the nominated groups are legally soiled because Google was involved in their selection⁵ and/or because they previously received funds from Google.⁶ Objectors have articulated no legal principle – and there is none – under which *cy pres* funds from a class settlement may not be distributed with the involvement of the defendant⁷ or to organizations that have previously received charitable contributions from the defendant.⁸ Last year, Google made over \$150 million

⁵ Class Member Objection, at 4-5 (asserting that the defendant should not have been involved in the selection of *cy pres* recipients).

⁶ In fact, neither objection explains *why* prior receipt of funds from Google should make a group ineligible to receive *cy pres* funds. See Class Member Objection, at 3-4 (listing without argument nominated groups that have received charitable funding or support from Google); Applicants' Objection, at 9 (stating without argument that some nominated groups have previously received funding from Google).

⁷ Courts commonly approve settlements that identify *cy pres* recipients in this manner. See, e.g. *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 30 (1st Cir. 2009) (affirming approval of settlement in which up to \$10 million went to ““mutually acceptable charitable organizations funding cancer research or patient care’ that the court would approve in the future””) (quoting settlement agreement); *Cervantez v. Celestica Corp.*, No. EDCV 07-729-VAP (OPx), 2010 WL 2712267 (C.D. Cal. July 6, 2010) (stating that unclaimed funds would be “donated to a charity mutually agreed-upon by the parties, subject to Court approval”) (final approval granted Nov. 1, 2010, Dkt. No. 202); *Bellows v. NCO Fin. Sys., Inc.*, No. 3:07-cv-01413-W-AJB, 2008 WL 5458986, at *5 (S.D. Cal. Dec. 10, 2008) (granting final approval to settlement providing for a “*cy pres* award totaling \$197,970 to one or more mutually agreed-upon organizations”) and *Bellows v. NCO Fin. Sys., Inc.*, 2009 WL 35466 (S. D. Cal. Jan 5, 2009) (approving and adopting the parties’ recommendations regarding *cy pres* recipients).

⁸Indeed, courts in this circuit routinely approve *cy pres* distribution plans in which some funds go to organizations that have previously received charitable contributions from the defendant. See, e.g., *Nickel v. Bank of Am. Nat. Trust and Savings Ass'n*, No. 94-2716 (SBA), 2009 WL 1270473 (N. D. Cal. May 6, 2009) (approving plan of *cy pres* distribution in which at least two of the designated charities had previously received charitable donations from Bank of America); compare Declaration of Daniel Rosenthal re: Sources and Uses of the Nickel v. Bank of America Settlement Funds, No. 94-2716, Dkt. 972 (N. D. Cal. filed Apr. 30, 2009), Exhibit B (including University of San Diego and Senior Community Centers in list of *cy pres* beneficiaries), with “Bank of America 2003 Grants and Sponsors in San Diego”, available at <http://www.prnewswire.com/news-releases/bank-of-america-2003-grants-and-sponsorships-in-san-diego-total-18-million-company-provides-support-to-more-than-190-local-organizations->

in charitable donations, much of it distributed across a broad range of public interest and academic organizations engaged in technology-related research and education.⁹ Hundreds of organizations received Google funding. There is no legal principle that categorically bars every group who received even a dollar of charitable funding from Google from receiving *cy pres* funds in this settlement, without regard to the merit of the group's proposal or whether the proposed program would advance the interests of the class.

The law requires that the *cy pres* distribution closely approximate the interests of the class, and that the settlement as a whole be fair, reasonable, and adequate. *See Six Mexican Workers*, 904 F.2d at 1308; Fed. R. Civ. Pr. 23(e). Here, Class Counsel have nominated 12 groups, each with an established record of independent service in the public interest. In compliance with this Court’s Order and the Settlement Agreement, the nominations are all for established programs focusing on Internet privacy. Class Counsel’s nominations are spread throughout the nation and represent a broad cross-section of advocacy, lobbying, education, and research organizations. Class’s Counsel nominees approach internet privacy using a wide array of methodologies and they focus their work on disparate populations groups, including the underprivileged and the young. Class Counsel’s list of nominations is fair, reasonable, and adequate, and the nominees are closely aligned with the interests of the class.

III

THE OBJECTORS' PROPOSED SLATE PROVIDES NO ADVANTAGES FOR THE

71748812.html (University of San Diego and Senior Community Centers received charitable donations from Bank of America in 2003). See also *Zaldivar v. T-Mobile USA, Inc.*, No. 07-1695 (RAJ), 2010 WL 1611981 (W. D. Wash. Mar. 16, 2010) (granting final approval to settlement where *cy pres* funds would go to the Mobile Giving Foundation). T-Mobile has long supported the Mobile Giving Foundation by waiving texting fees for customers who make charitable donations to the Foundation via text. See “Frequently Asked Questions About the Mobile Giving Foundation”, available at http://mobilegiving.org/?page_id=24 (listing T-Mobile USA among wireless carriers that support the Mobile Giving Foundation).

⁹ See <http://www.google.org/googlers.html>

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CLASS, ONLY FOR THE OBJECTORS

2 By contrast to Class Counsel's broad set of nominees, the Applicant Objectors propose a
 3 slate of nominees with these characteristics:

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- 5 • Each of the 8 applicant objectors would receive funds from the settlement but no other group would.
 - 6 • Each of the 8 applicant objectors would receive 100% of the money that their application sought.
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 - 8 • Each of the 8 applicant objectors' grants from this settlement would constitute a substantial portion of their entire annual funding – indeed four of the groups propose grants for themselves that are more than 150% of their entire 2010 budget, and only one grant would be for less than half (39%) of the group's entire 2011 budget:

11 GROUP	12 2011 Budget	13 Grant Proposed For Self	14 Grant as % of 2011 Budget
15 World Privacy Forum	16 90,000	17 450,000	18 500%
19 EPIC	20 1,063,688	21 1,750,000	22 164%
23 Patient Privacy Rights	24 417,000	25 643,000	26 154%
27 Center for Digital Democracy	28 306,500	29 450,000	30 147%
31 Privacy Rights Clearinghouse	32 376,387	33 265,000	34 70%
35 Privacy Activism	36 223,000	37 153,000	38 69%
39 US PIRG	40 1,900,000	41 1,000,000	42 53%
43 Consumer Action	44 3,200,000	45 1,250,000	46 39%

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21 The Applicant Objectors justify this self-allocation on the basis that, "Virtually none of
 22 the organizations receiving funds in the proposed *cy pres* settlement showed any interest in the
 23 circumstances of Class members prior to the announcement of the *cy pres* settlement in this
 24 matter," Applicants' Objection at 9, and that the nominated groups "stand by quietly while others
 25 do the actual work of safeguarding Internet privacy." *Id.* at 9-10. These characterizations by
 26 the Applicant Objectors are confusing in that, as noted above, the Applicant Objectors are aware
 27 of the significant privacy work done by the nominated groups. Perhaps the Applicant Objectors
 28 mean simply to limit their criticism of the nominated groups to the fact that few addressed

1 Google's launch of Buzz specifically. Again, as noted above, however, a number of the
 2 nominated groups did strongly criticize Google over the launch of Buzz. Moreover, what is odd
 3 about criticizing the nominated groups on the Buzz front is that this criticism applies as well, or
 4 perhaps even more, to 7 of the 8 Applicant Objectors, none of whom, as far as Class Counsel is
 5 aware, undertook any advocacy or public education work related to Buzz specifically. The
 6 lawyers at the eighth group, EPIC, elected to pursue the Buzz matter by filing a complaint with
 7 the Federal Trade Commission, a chosen route that appears not to enable the recovery of
 8 attorney's fees. Nothing, at the end of the day, distinguishes the 8 Applicant Objectors as a group
 9 among the 77 total applicants and 12 nominated groups such that the Court would be required to
 10 order their inclusion as *cy pres* recipients.

11 CONCLUSION

12 In sum, the parties have complied with every aspect of this Court's Order, and Class
 13 Counsel have propounded a nomination list that meets the requirements of law and promotes the
 14 interests of the class. Objectors insist, perhaps inevitably, that a different slate of applicants
 15 should have been nominated. Among the 300,000,000,000,000,000,000 nomination slates
 16 that could be constructed with 77 different applicants and any number of possible combinations,
 17 the Applicant Objectors propose the one slate that provides 100% of the available funds to their 8
 18 groups. Rather than indulge such attempts to micro-manage the *cy pres* selection process among
 19 the 77 applicants and nearly infinite possible slates, more of which may follow on the heels of
 20 this one, the Court's role is to ensure that the parties carefully followed the procedures set forth in
 21 its Order of February 16, and the terms of the Settlement Agreement, and that Class Counsel
 22 nominated a final slate of recipients consistent with the Class's interests. The parties have
 23 carefully followed the Court's ordered approach and Class Counsel's nominations are well-
 24 known, well-established, well-regarded privacy groups whose work is clearly in the Class's
 25 interests. The parties respectfully request that the Court, after reviewing these filings, enter the
 26 proposed Final Approval Order.

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Respectfully submitted,

DATED: April 4, 2011

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